WOODWARD & COMPANY

Woodward & Company LLP Newsletter **November 2014**

The definition of 'Indian' (*Daniels* v. *Canada (Minister of Indian Affairs and Northern Development)*, 2014 FCA 101)

In 2013, Justice Michael Phelan of the Federal Court declared that "Métis" and "non-status Indians" are "Indians" within the meaning of s 91(24) of the *Constitution Act, 1867*, meaning that Canada has legislative jurisdiction with respect to these individuals.

This decision was appealed by Canada to the Federal Court of Appeal in *Daniels* v. *Canada (Minister of Indian Affairs and Northern Development)*, 2014 FCA 101. Canada argued that Justice Phelan erred in issuing these declarations, and had created jurisdictional uncertainty between the federal and provincial governments.

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CBA withdraws intervention against Indigenous Ecuadorians

THE CANADIAN BAR ASSOCIATION

Our October 2014 newsletter mentioned the Canadian Bar Association, a voluntary association representing Canadian legal professionals, and its intervention in a dispute between Chevron and a group of Indigenous Ecuadorian villagers before the Supreme Court of Canada (*Yaiguaje et al* v. *Chevron Canada Ltd et al*). The villagers obtained an award of $9.51 billion (US$) in Ecuadorian court, for the devastating pollution and damage to their lands, waterways and livelihoods caused by Texaco, a Chevron subsidiary. They are now seeking to enforce this judgment against Chevron's Canadian assets.

The CBA, without consulting with its Aboriginal Law and Environmental Law sections, filed an intervention in the case supporting Chevron, and arguing for the limitation of corporate liability against foreign judgments. Woodward and Co, along with members of the Aboriginal Law section, opposed both the substance of the intervention and the CBA's failure to consult with its members, and called on the CBA Executive to withdraw from the case.

On October 16, 2014, the CBA announced that it would be withdrawing its intervention and reviewing the policies and procedures that originally led to the intervention being approved. ❖

UPCOMING EVENTS:

November 21-22: **Heather Mahony** speaks at **Between Keewatin and Tsilhqot'in: Reflections from the Centre of Turtle Island.** The conference is at the University of Manitoba's Faculty of Law.

November 25-26: **Drew Mildon** will present at CI Energy Group's **Building Aboriginal Relationships in BC** in Vancouver at the Metropolitan Hotel. Drew will speak on the implications of the Tsilhqot'in Nation decision on the 25th, and present a workshop on the Fundamentals of Aboriginal Law on the 26th.

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The FCA upheld the declaration as it applied to Métis persons. The Métis are an identifiable group. The legal definition of the term does not encompass all individuals with mixed First Nations and European ancestry, but rather refers to "distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life and recognizable group identity separate from their Indian or Inuit and European forbearers" (para 87).

The effect of the declaration is relatively limited. It only recognizes Canada's legislative jurisdiction concerning Métis people: Canada does not have a duty to legislate, does not owe a fiduciary duty, and does not have a general duty to consult or negotiate with Métis people. Such duties may, however, arise under specific circumstances, but the Court refused to decide the issue without the adequate facts before it.

The FCA overturned the declaration as it applied to "non-status Indians", concluding that such a declaration "lacked practical utility" (para 74). They held that the reasons for excluding people from status are complex and far-ranging. To properly determine the limits of the term "Indian", it would be necessary to analyze each reason for exclusion on a case-by-case basis. The declaration issued by Justice Phelan was too broad to be appropriate or useful.

In June 2014, the plaintiffs applied to the Supreme Court of Canada for leave to appeal the decision, but the Court has not yet decided whether to grant such leave. ❖

Lest We Forget…

No independent duty to negotiate; strong evidence will drive negotiation of Aboriginal claims (*Sam* v. *British Columbia*, 2014 BCSC 1783)

Earlier this year, the BC Supreme Court heard a novel argument regarding the effects of the *Tsilhqot'in* decision on the legal landscape.

The Songhees Nation and the Esquimalt Nation are claiming damages from the federal and provincial Crown for breach of their treaty rights, in two actions that will be heard together in a trial beginning in late November. Canada has expressed interest in negotiating with the plaintiffs, but BC has refused to participate, denying all liability. The trial is projected to be lengthy and expensive for the parties. In *Sam* v. *British Columbia*, 2014 BCSC 1783, the Songhees Nation applied to the Court for an order directing Canada and BC to negotiate with them in an effort to resolve this matter before trial.

Prior case law has established that the Crown has a duty to consult, and a duty to act in good faith in the course of negotiations, but no duty to negotiate. Songhees argued that the *Tsilhqot'in* decision created a new duty of the Crown to negotiate and make a reasonable offer of settlement when faced with land claims, based on the Supreme Court of Canada's statement in that case that "governments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands".

The Court concluded that this statement was confined to the facts of that case, and that there is no general duty to negotiate Aboriginal claims. Rather, the law is still that the honour of the Crown requires it "to consult and accommodate those claims in a manner proportionate to the strength of the case supporting the existence of the right or title claimed".

The *Sam* decision is a reminder that negotiation is not a given, and strong evidentiary foundations remain the key to compelling the Crown to negotiate Aboriginal rights and title and treaty claims. ❖